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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Soil and Water Conservation Board
Virginia Administrative Code (VAC) citation	4 VAC 50-60
Regulation title	Virginia Stormwater Management Program (VSMP) Permit Regulations
Action title	Amend the General Permit for Discharges of Stormwater from Construction Activities found in Part XIV of the Virginia Stormwater Management Permit Program Regulations and its associated definitions found in Part I of those Regulations.
Date this document prepared	March 22, 2008

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this regulatory action is to consider amendments to the applicable portions of the Virginia Soil and Water Conservation Board's Virginia Stormwater Management Program (VSMP) Permit Regulations in order to develop a new General Permit for Stormwater Discharges from Construction Activities. Regulations developed under the federal Clean Water Act (33 USC §1251 et seq.) and §10.1-603.1 et seq. of the Code of Virginia require that VSMP permits be effective for a fixed term not to exceed five years (§10.1-603.2:2 (B)). The State Water Control Board (Department of Environmental Quality) issued the existing 5-year General Permit on July 1, 2004 thus necessitating the promulgation of a new General Permit by the June 30, 2009 expiration date.

Potential changes that the Virginia Soil and Water Conservation Board has authorized the consideration of include, but are not limited to, compliance with water quality and quantity

standards set out in Stormwater Management Program Technical Criteria (4 VAC 50-60-40 through 4 VAC 50-60-90) [Part II], compliance with local program technical criteria set out in Local Programs (4 VAC 50-60-100 through 4 VAC 50-60-150) [Part III], compliance with the technical and administrative requirements set out in Technical Criteria and Permit Application Requirements for State Projects (4 VAC 50-60-160 through 4 VAC 50-60-200) [Part IV], compliance with the general requirements set out in VSMP General Program Requirements Related to MS4s and Land-Disturbing Activities (4 VAC 50-60-300 through 4 VAC 50-60-350) [Part VI], compliance with the requirements set out in VSMP Permit Applications (4 VAC 50-60-360 through 4 VAC 50-60-420) [Part VII], compliance with the general permit conditions set out in VSMP Permit Conditions (4 VAC 50-60-430 through 4 VAC 50-60-490) [Part VIII], Stormwater Pollution Prevention Plan requirements including water quality and quantity standards, consistency requirements with other regulations such as Erosion and Sediment Control, requirements for impaired waters and waters with an EPA approved TMDL, timing of effective date of permit coverage, registration statement requirements, timing of registration submittal and other registration processes, procedures for permit termination and transfer, operation and maintenance of construction site controls and procedures, natural resource protection considerations, monitoring processes, amendments to definitions contained in Part I of the Regulations (4 VAC 50-60-10), and amendments to forms related to the General Permit for Stormwater Discharges from Construction Activities.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The General Permit for Stormwater Discharges from Construction Activities is a permit issued through regulation by the Virginia Soil and Water Conservation Board pursuant to the federal Clean Water Act and the Virginia Stormwater Management Law.

Requirements set forth in the federal Clean Water Act (33 USC §1251 et seq.), formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, as amended by Public Law 95-217, Public Law 95-576, Public Law 96-483, and Public Law 97-117, or any subsequent revisions thereto, and its attendant regulations set forth in 40 CFR Parts 122, 123, 124 and 125 require states to establish a permitting program for the management of stormwater from construction activity.

Section 402 of the Clean Water Act (33 USC §1251 et seq.) allows the federal Environmental Protection Agency (EPA) to authorize states to administer the National Pollutant Discharge Elimination System (NPDES) permit program. The Commonwealth of Virginia received such authorization in 1975 under the terms of a Memorandum of Understanding with the U.S. EPA. This Memorandum of Understanding was modified on May 20, 1991 to authorize the Commonwealth to administer a General Virginia Pollutant Discharge Elimination System (VPDES) Permit Program. The Virginia Soil and Water Conservation Board was designated responsibility for this program by Chapter 372 of the 2004 Virginia Acts of Assembly (HB 1177)

with transfer of program authority from the State Water Control Board and DEQ to the Virginia Soil and Water Conservation Board and DCR approved by the EPA effective January 29, 2005.

The basis for this regulation under state law is the Virginia Stormwater Management Law, §10.1-603.1 et seq. of the Code of Virginia. Specifically, §10.1-603.2:1 requires the Virginia Soil and Water Conservation Board (Board) to permit, regulate, and control stormwater runoff in the Commonwealth. In carrying out its responsibilities, the Board may issue, deny, revoke, terminate, amend and enforce permits for the control of stormwater discharges from construction activities (subsection 1); adopt regulations (subsection 2); and otherwise act to ensure the general health, safety and welfare of the citizens of the Commonwealth as well as protect the quality and quantity of state waters from the potential harm of unmanaged stormwater. Additionally, §10.1-603.2:2 (A) states that it shall be unlawful to cause a stormwater discharge from a land disturbing activity except in compliance with a permit.

On March 20, 2008, the Board authorized the filing of a NOIRA related to the General Permit for Discharges of Stormwater from Construction Activities. The Board's action authorized the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to prepare and submit a NOIRA to solicit recommendations and to consider changes to the VSMP regulations related to the General Permit in accordance with the Administrative Process Act exemption requirements specified in §2.2-4006 A9, the Virginia Register Act and other applicable technical rule making protocols. The authorization extended to, but was not limited to, the drafting and filing of the NOIRA, the holding of public meetings, if deemed necessary, the development of the draft proposed regulations and other necessary documents and documentation, as well as, the coordination necessary to gain approvals from the Attorney General, the Virginia Registrar of Regulations and the U.S. Environmental Protection Agency.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

The EPA Phase 1 stormwater regulations, published in the Federal Register on November 11, 1990, and Phase 2 stormwater regulations, published in the Federal Register on December 8, 1999, and incorporated into the VSMP Permit Regulation (4VAC 50-60-10 et seq.) effective January 29, 2005, require construction activity operators to apply for VSMP permit coverage. Construction activity means any clearing, grading or excavation associated with a large or small construction activity.

Large construction activity includes clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Large construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.

Small construction activity includes clearing, grading, and excavating that results in land disturbance of equal to or greater than one acre, or equal to or greater than 2,500 square feet in all areas of the jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations adopted pursuant to the Chesapeake Bay Preservation Act, and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

This proposed regulatory action is needed to allow operators of construction activities to apply or reapply for permit coverage by the regulatory deadline of April 1, 2009, which is 90 days prior to the expiration of the current General Permit unless permission for a later date has been granted by the Board (4VAC 50-60-1170, SECTION III (M)).

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

This is an amendment of an existing General Permit regulation entitled General Virginia Stormwater Management Program (VSMP) Permit for Discharges of Stormwater from Construction Activities (4 VAC 50-60-1100 through 4 VAC 50-60-1170) [Part XIV]. In addition to other amendments, the Board will consider amendments that will require compliance with water quality and quantity standards set out in Stormwater Management Program Technical Criteria (4 VAC 50-60-40 through 4 VAC 50-60-90) [Part II], compliance with local program technical criteria set out in Local Programs (4 VAC 50-60-100 through 4 VAC 50-60-150) [Part III], compliance with the technical and administrative requirements set out in Technical Criteria and Permit Application Requirements for State Projects (4 VAC 50-60-160 through 4 VAC 50-60-200) [Part IV], compliance with the general requirements set out in VSMP General Program Requirements Related to MS4s and Land-Disturbing Activities (4 VAC 50-60-300 through 4 VAC 50-60-350) [Part VI], compliance with the requirements set out in VSMP Permit Applications (4 VAC 50-60-360 through 4 VAC 50-60-420) [Part VII], compliance with the general permit conditions set out in VSMP Permit Conditions (4 VAC 50-60-430 through 4 VAC 50-60-490) [Part VIII], consistency requirements with other regulations such as Erosion and Sediment Control, requirements for impaired waters and waters with an EPA approved TMDL, timing of effective date of permit coverage, registration statement requirements, timing of registration submittal and other registration processes, procedures for permit termination and transfer, operation and maintenance of construction site controls and procedures, natural resource protection considerations, monitoring processes, amendments to definitions contained in Part I of the Regulations (4 VAC 50-60-10), and amendments to forms related to the General Permit for Stormwater Discharges from Construction Activities.

The Board will also consider requirements for stormwater pollution prevention plans (SWPPP), including, but not limited to:

- 1) Deadlines for SWPPP preparation and compliance;
- 2) Maintenance and updates of the SWPPP;
- 3) Incorporation by reference of plans such as erosion and sediment control plans, spill prevention controls and countermeasures, and stormwater management plans;
- 4) Content of the SWPPP such as site and activities description, erosion and sediment controls, site management practices, stormwater management for quantity and quality, controls for other pollutants such as building material, garbage and debris, maintenance of controls, and modifications and additions of BMPs;
- 5) Inspection requirements such as by qualified personnel, frequency, location, and reports; and
- 6) Compliance with other local and state regulations such as erosion and sediment control, waste disposal and sanitary sewer or septic system regulations.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

Federal and state requirements that permit stormwater discharges from construction activities provide only one alternative to the General Permit for compliance with the regulations and that is: DCR could issue each construction activity an individual VSMP permit to regulate stormwater discharges related to water quality and quantity. Due to the number of construction activities that are required to be permitted, it is not practical to issue individual permits to each construction activity; it is anticipated that individual permits will only be issued to those sites that do not qualify for coverage under the new General Permit. The substance, format, and procedures of these regulations will ultimately depend upon approval from the U.S. Environmental Protection Agency, which has national oversight of all Clean Water Act programs.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.

The Board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the

regulation. The Virginia Stormwater Management Program (VSMP) Permit Regulations (Chapter 60) can be found online at <http://leg1.state.va.us/000/reg/TOC04050.HTM#C0060>.

The Board is also seeking information on impacts to small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Persons desiring to submit written comments pertaining to this notice may do so by mail, the Internet, or facsimile.

- Comments pertaining to this notice should be sent to the Regulatory Coordinator at: Virginia Department of Conservation and Recreation, 203 Governor Street, Suite 302, Richmond, Virginia 23219.
- Electronic comments also may be submitted on the Virginia Regulatory TownHall by going to the Public Comment Forums portion of TownHall at the following link, scrolling down to the Secretariat of Natural Resources regulatory actions, and selecting the “Amend the General Permit for Discharges of Stormwater from Construction Activities...” NOIRA to comment on: <http://townhall.virginia.gov/L/Forums.cfm>.
- Or comments may be faxed to the Regulatory Coordinator at: (804) 786-6141.

All written comments must include the name and address of the commenter. In order to be considered, comments must be received by 5:00 p.m. on the date established as the close of the comment period. For additional information regarding this regulatory action you may contact Mr. David Dowling at (804) 786-2291 or at regcord@dcr.virginia.gov.

The Department as authorized by the Board intends to utilize a modified public participatory approach in the development of these regulatory amendments in accordance with the Administrative Process Act exemption requirements specified in §2.2-4006 A9. Following publication of the proposed regulation in the Virginia Register of Regulations, the Department as authorized by the Board will hold a public hearing to provide opportunity for public comment. Notice of the hearing will be posted on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov). Both oral and written comments may be submitted at that time.

Participatory approach

Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, technical advisory committees) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The Department will be utilizing a modified participatory approach in accordance with the Administrative Process Act exemption requirements specified in §2.2-4006 A9. The

Department, as authorized by the Board, is forming a Technical Advisory Committee composed of relevant stakeholders to assist in the development of the proposed regulations. Persons interested in participating on the advisory committee should provide their name, address, telephone number, email address, and the name of the organization they represent to the Agency Regulatory Coordinator for consideration by no later than 5:00 p.m. on the last day of the comment period.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

It is not anticipated that this regulation will have a direct impact on the institution of the family or family stability. However, improvement of water quality does have positive public health and safety benefits that have an indirect impact on families.